BR-112118

Claimant who worked extended hours over a 2-month period, including 98 hours in 6 days, had good cause to quit. It was unreasonable to expect her to work under those conditions indefinitely until the employer could hire more staff.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to deny unemployment benefits following the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant resigned from her job on July 24, 2009. She filed a claim for unemployment benefits with the DUA and was approved in a determination issued by the agency on October 16, 2009. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, the review examiner overturned the agency's initial determination and denied the claimant benefits in a decision rendered on December 4, 2009.

Benefits were denied after the review examiner determined that the claimant left her employment without good cause attributable to the employer and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). Our decision is based upon a review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue on appeal is whether the excessive number of hours of work required by the employer constituted good cause for the claimant to resign.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant was employed as a full-time estimator by the employer, from May 26, 2009 until July 24, 2009 when the claimant quit.

2. The employer is a fire and water cleaning company.

3. The claimant was hired to work Monday to Friday, from 7 am to 5pm. In addition to the claimant's regular schedule, the claimant was also required to be on call for work at any time from Monday to Sunday during one week per month. The claimant was on call for the month of June, 2009 from June 26, 2009 to July 4, 2009. The claimant was on call for the month of July, 2009 from July 17, 2009 until July 24, 2009.

4. The claimant was aware of what her schedule would be when she accepted the position with the employer.

5. When the claimant was on call for work, she would sometimes be required to be at job sites at two (2) am.

6. The claimant quit because the claimant was exhausted from working too many hours.

7. On an unknown date in July 2009, the claimant complained to the employer that the claimant was exhausted because she was working too many hours. The employer informed the claimant that more people would be hired and that the claimant should hang in there.

8. The claimant's job was not in jeopardy.

9. The employer had work available for the claimant.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25 (e), provides, in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for...the period of unemployment next ensuing...after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent...

The review examiner found that that the claimant was hired to work for the employer under terms of employment that included a 40-hour Monday through Friday 7:00 a.m. to 5:00 p.m. schedule, plus to be on-call available 24 hours a day for 7 days per month. At the hearing, the employer conceded that employee turnover would require the claimant to work extra shifts on-call.[1] In her short tenure with the employer, the claimant actually worked 7:00 a.m. to 7:00 p.m. shifts back to back with her 24-hour on-call hours, and was rotated on-call more than 7 days in one month. The review examiner found that the claimant quit because she was exhausted.

The Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's action has the burden to show that she made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93-94 (1984). In this case, the claimant did complain to the employer about working too many hours. According to the claimant's unrefuted testimony, during her last week of employment, she worked over 98 hours in 6 days. This amounts to an average of 16 hours per day. Although the employer assured her that he would hire more people, the immediate solution that she was afforded was to "hang in there." It is not reasonable to require an employee to work under those conditions indefinitely until the employer increases its workforce.

We, therefore, conclude as a matter of law that the claimant's separation, while voluntary, was for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to benefits for the week ending August 8, 2009, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - March 3, 2011

/s/

John A. King, Esq.
Chairman

/s/

Sandor J. Zapolin
Member

/s/

Stephen M. Linsky, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed.)

LAST DAY TO FILE AN APPEAL IN COURT – April 4, 2011

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[1] The hours actually worked by the claimant during her final two weeks of employment, while not explicitly incorporated into the review examiner's findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).